IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

NO. 82-6089

Supreme Court, U.S.
FILED
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TIMOTHY EUGENE MORRIS

Petitioner

vs.

TENNESSEE
WILLIAM M. LEECH

Attorney General and Reporter

ROBERT L. JOLLY
Assistant Attorney General
Nashville, Tennessee

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

WILLIAM H. BELL
101 West Depost Street
Greeneville, Tennessee 37743
(615) 639-7279

PETITION FOR WRIT OF CERTORARI

Questions Presented For Review

(1) Whether Petitioner was denied his Fifth Amendment, Sixth Amendment, and Fourteenth Amendment rights under the Constitution of the United States in that the trial court failed to exclude two (2) statements given by the defendant, without an attorney present.

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Conviction affirmed on appeal State v. Morris, S. Ct. No. 16, (641 S.W. 2nd 883). Petition for rehearing denied State v. Morris, S. Ct. No. 16 (November 29, 1982).

Statement of Grounds for Jurisdiction

This is an appeal from a judgment of the Supreme Court of Tennessee at Knoxville. Judgment decided and filed on October 12, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Constitutional Provisions and Statutes

1. The Constitution of the United States, Amendment V provides that no person
   "Shall be compelled in any criminal case to be a witness against himself . . ."

2. The Sixth Amendment to the Constitution provides in a relevant part:
   In all criminal prosecutions, the accused will enjoy the right . . . to have the assistance of counsel for his defense.

3. The Fourteenth Amendment to the Constitution of the United States provides in its part:
   "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

Timothy Eugene Morris seeks a writ of certiorari from this Court to the Supreme Court of Tennessee, Knoxville, Tennessee, to review a decision of that Court imposing the death penalty upon Timothy Eugene Morris.

In the early part of June, 1980, the Appellant left

Florida with two (2) other people in a car belonging to Terral Anderson. They were traveling North when they were stopped by the authorities for a problem with registration in Crossville, Tennessee, on June 11, 1980. There, the car was impounded and the three of them were escorted to the Kentucky/Tennessee state line. From there, they hitchiked through Illinois and Indiana. Eventually , the Appellant and Terrel Anderson reached Nashville on or about June 19, 1980. There, Morris and Anderson separated. While in Nashville, Morris wrote a letter to Becky Bladow, telling her that he planned to purchase a motorcycle and would be back in Florida in the near future.

Morris said he met Hunter Tait on the street, in Nashville, Tennessee in the latter part of June 1980. They left Nashville together, and traveled to various state parks for approximately a week. Morris accompanied Tait to the Towsend, Tennessee Arts and Crafts Festival, where he assisted Tait in his craft booth. The two remained at the fair through Sunday and left early Monday morning, the first day of July, 1980.

Morris testified that on Sunday night of the previous day, Tait offered to sell Morris his truck for some $50.00, and that Monday morning (the first of July) Tait told Morris he was going to the Bahamas for a few days. Tait said he was to be picked up by some friends at a spot on the road, just below Townsend.

Morris said he drove away in the truck he purchased from Tait, which contained all of Tait's goods, leaving Tait sitting on a rock by the creek. Morris admitted that Tait was probably not aware that all his goods has been taken with the truck.

From there, Morris went to visit his relatives in Weaverville, North Carolina, where he stayed approximately one (1)

day. There, he gave away various items of the stained glass merchandise which were in the truck. Then he headed south to Florida.

Shortly after he crossed the Florida state line, he was pulled over by an officer with the State Agricultural Inspection station. Once he was in Florida, Morris forged several checks in the name of Hunter Tait, having found a check book in the cab of the truck.

On July 6, 1980, a body was found on Rich Mountain in Greene County, Tennessee. Although the body was badly decomposed, identification was made through the comparison of fingerprints. Agent Bob Baird of the Tennessee Bureau of Investigation learned that the last person seen with Hunter Tait was the Appellant.

In August 1980, Morris was questioned by local authorities in regard to the whereabouts of Hunter Tait. This questioning was in response to a missing person report filed by Tait's mother. Early in September, the Appellant left Florida with his wife, a resident of Titusville, Florida, and headed west towards California, where his wife's parents lived. In route, he was apprehended at Sierra Blanca, Texas, a few miles inside the continental United States, where he was found asleep in his car. The arrest was in response to an indictment for First Degree Murder handed down by the Grand Jury of Greene County, Tennessee, in early September, of 1980.

When Morris was returned to Greene County, TBI agent, Bob Baird took his statement, after obtaining a waiver of his Miranda rights. Morris refused to sign the statement, which said in effect that Morris had traveled north with two other people,

had met Hunter Tait in Nashville, Tennessee, and had accompanied him to various state parks and to the Townsend Arts and Crafts Fair. The statement further said that Morris had bought Tait's truck for $50.00.

In denying the motion of the accused to supress this statement, the Court found that the statement was valid and should be allowed into evidence, even though the statement was unsigned, was in Agent Bob Baird's handwriting, was unwitnessed, and was taken despite Appellant's repeated request for the presence of an attorney. The state admitted that its entire case was circumstantial.

Appellant, Timothy Eugene Morris, was convicted in the Criminal Court of Greene County, Tennessee of murder in the first degree of Hunter Tait. He was sentenced to death by electricution. Appeal was taken directly to the Supreme Court of Tennessee as provided by in statute, T.C.A. 39-2406. After review of the trial record, the sentence and the briefs on appeal, the Supreme Court of Tennessee affirmed the judgment of the Trial Court. The Appellant petitioned for the Supreme Court of Tennessee to Rehear, the Petition to Rehear was denied on November 29, 1982.

ARGUMENT

The Appellant was questioned in a trailor in Jacksonville, Florida, by Detective Henry Hines and two (2) uniformed officers. Detective Hines states that the defendant was given no Miranda warnings. Detective Hines stated that the Defendant appeared to be "hung over and tired". He further testified that the Defendant did " . . . appear to be tired or fatigued and appeared like he had something to drink the previous night." The Defendant said he had absolutely no recollection of being

interviewed by Detective Hines. The Defendant testifies that he had been drinking heavily the night before, and was in fact drinking at the time.

Intoxication in combination with fatigue can militate against finding a statement admissable in that it was not knowingly and intelligently made. As a general rule the proof about one who makes statements, concerning a crime while one is intoxicated, goes to the weight and credibility to be accorded to the confession. Pyburn v. State, (Tn. Crim) 539 S.W. 2d 835 (1975). The Appellant admits that alcohol intoxication is merely a factor in determining voluntariness. Lowe v. State, (Tn. Crim.) 584 S.W. 2d 239 (1979). The Appellant contends that his intoxication was so pronounced that his statement to Detective Hines should be excluded.

The second statement was given on September 6, 1980 to Tennessee Bureau of Investigation's agent, Bob Baird. The alleged statement was taken at the Greeneville Police Department. The Defendant was under arrest at the time. He was already indicted. There was no attorney present. The Defendant signed a standard Miranda waiver. The Defendant refused to sign the statement. The Statement was in Agent Bob Baird's handwriting, not the Defendant's. There were no witnesses present. There was no tape recording of the conversation. The Tennessee Bureau of Investigation's agent Bob Baird, said the Defendant did not request an attorney during the interview. The Defendant said that he did request an attorney repeatedly through out the interview. The mere fact that the Appellant signed a waiver of rights and allegedly answered some questions of Agent Bob Baird's does not derogate the Defendant's right to stop the interview at any point by demanding an attorney. Miranda v. Arizona, 384 U.S. 426, 16 L.

Ed. 2d 694, 86 S. Court 1602, 10 A.L.R. 3d 974 (1966). An accused may waive his Miranda rights, but the burden is on the State to establish that the waiver was voluntary. McPhearson v. State, (Tn. Crim.) 562 S.W. 2d 210 (1977). The burden is upon the prosecution to show that the confession was voluntary before it can be received into evidence if objection is made to its introduction. Lego v. Twomey, 404 U.S. 477, 30 L.Ed. 2d 618, 92 S.Ct. 619 (1972). In the present case the only evidence that Agent Bob Baird can produce to carry his burden of proof is that the Defendant signed a Miranda rights waiver. As has been previously shown, there was no tape recording as there was in State v. Pritchett, 621 S.W. 2d 127, (1981). There were no witnesses as there was in Houston v. State, 593 S.W. 2d 267, (1980). There was no lawyer. The statement was not signed and it was in Agent Bob Baird's handwriting. The Defendant testified that he repeatedly asked Bob Baird for a lawyer. All points considered, this is extremely odd behavior for a trained agent for the State. If ever a set of circumstances demonstrated the State's failure to carry a Lego burden, this is it. The Defendant by demanding an attorney, and this demand not being met, during interrogation, denied the Appellant's Fifth Amendment right against self-incrimination, and his Sixth Amendment right to counsel, as applied to the State's via Fourteenth Amendment, to the United States Constitution.

Argument

A Defendant's right to effective assistances of counsel, guaranteed by the Sixth Amendment to the United States Constitution, adheres to every critical stage of a criminal proceeding.

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

In Chapman v. California, 368 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), this Court stated the rules to be applied in determining whether constitutional error occuring during a criminal proceeding is harmless. The Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error". Id. 368 U.S. at 24, 87 S.Ct. at 827-28. The right to counsel, as established in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), was noted as one such basic right. Id. 368 U.S. at 24 n. 8, 87 S. Ct. at 828.

Although the case of Angersinger v. Howard, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), dealt with misdemeanants facing jail sentences upon conviction, the U.S. Supreme Court stated that the right to counsel is fundamental to a fair trial 407 U.S. at 32, 92 S.Ct. at 2010. This concept was restated by the Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 426 (1978) wherein the Court held:

> "This Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error' . . . Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." Id. 435 U.S. at 490, 98 S.Ct. at 1181 (citation omitted.)

The petitioner respectfully submits that under the evolving precedents of this Court the right to remain silent and against self-incrimination, and the right to counsel, are rights so basic to a fair trial that their infraction at any critical stage in the criminal process, particularly a custodial interrog-

ation, works such a prejudice against the Defendant as to deny the Defendant his Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Conclusion

For the reasons stated herein, Timothy Eugene Morris, respectfully asks that a writ of certiorari issued to review the decision of the Tennessee Supreme Court, below.

BY: W. H. Bell

WILLIAM H. BELL
101 West Depot Street
Greeneville, Tennessee 37743
(615) 639-7279

CERTIFICATE OF SERVICE

I, WILLIAM H. BELL, hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Supreme Court has been forwarded by United States Mail, postpaid, this the 24 day of January, 1983, upon William Leech, Attorney General, 450 James Robertson Parkway, Nashville Tennessee 37219.

BY: W. H. Bell

WILLIAM H. BELL

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

TIMOTHY EUGENE MORRIS

Petitioner

vs.

WILLIAM M. LEECH

Attorney General and Reporter

ROBERT L. JOLLY

Assistant Attorney General
Nashville, Tennessee

Respondent.

APPENDIX

WILLIAM H. BELL
101 West Depot Street
Greeneville, Tennessee 37743
(615) 639-7279

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FILED
OCT 1 2 1982
JOHN A. PARKER, Clerk
BY

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

For Publication

October 12, 1982

STATE OF TENNESSEE,
Plaintiff-Appellee,

vs.

TIMOTHY EUGENE MORRIS,
Defendant-Appellant.

Greene Criminal
S. Ct. No. 16
Hon. James E. Beckner, Judge

For Plaintiff-Appellee:

William M. Leech, Jr.
Attorney General & Reporter

Robert L. Jolley, Jr.
Assistant Attorney General

Nashville, Tennessee

For Defendant-Appellant:

William H. Bell
James E. Stevens
Greeneville, Tennessee

OPINION

AFFIRMED

HARBISON, C.J.

Appellant, Timothy Eugene Morris, was convicted in the Criminal Court of Greene County, Tennessee of murder in the first degree of Hunter David Tait. He was sentenced to death by electrocution. Appeal was taken to this Court as provided by statute, T.C.A. § 39-2406. After review of the trial record, the sentence and the briefs on appeal, we affirm the judgment of the trial court.

The principal issues raised on appeal pertain to the sufficiency of the convicting evidence. This was circumstantial in nature inasmuch as appellant denied committing the homicide, no murder weapon was ever found or traced to appellant, and there were no eyewitnesses. On the other hand, appellant and the deceased were last seen together on or about June 30, 1980, traveling from Townsend, Tennessee, toward Gatlinburg. The next day appellant appeared alone at the home of relatives in North Carolina in possession of a vehicle belonging to the deceased and containing several thousand dollars worth of inventory and personal property owned by the deceased. He also had possession of a check book and the financial records of the deceased, forged checks on the bank account of the victim and claimed that the victim had sold him the vehicle with all its contents for the sum of fifty dollars. A few days after appellant appeared in North Carolina and then in the area of his home in south Georgia and north Florida in possession of the property and checks of the deceased, the badly decomposed body of the victim was found in Greene County, Tennessee, near the North Carolina line and was subsequently identified through fingerprints as being the body of Hunter David Tait.

The decedent was approximately thirty-seven years

of age and resided near Clinton, Arkansas. He was unmarried and lived alone. He was a skilled artisan in the manufacture of flower planters and other articles decorated with ornamental stained glass. Mr. Tait had established a cottage-type manufacturing business near his home and manufactured several thousands of dollars worth of stained-glass planters and other ornamental objects each year. He attended craft and arts fairs throughout the United States where he sold his wares, as well as making some direct sales from his home. He had purchased and equipped a pick-up truck with special seating and a camper bed in which he transported his wares, kept financial records and slept. He was well respected in his home community, and a number of his friends and neighbors testified at the trial of the case.

The deceased had left his home in Arkansas about June 7, 1980, to attend several craft fairs and exhibits in Tennessee. He had expected to return to Arkansas early in July, and his mother, who resided in Florida, had planned to visit him later in that month. Testimony showed that Mr. Tait had attended a crafts fair at the 100 Oaks Mall Shopping Center in Nashville near the middle of June, and it was while in Nashville that he met appellant, Timothy Eugene Morris.

Appellant was twenty-seven years old at the time of the trial. He was married but living separately from his wife. Appellant also was gifted in various types of handicrafts. He had seldom worked steadily for any length of time and was described in the record as a drifter. He had had several prior criminal convictions for burglary, larceny and manslaughter. His father, stepmother and other relatives

lived near the Georgia-Florida border and he had other relatives living in North Carolina.

Early in June 1980 appellant left Florida with two other young men intending to travel to Illinois. They were stopped in Crossville, Tennessee, where their car was impounded because of problems with registration and upon a complaint of a hitchhicker who had left a backpack in the car. Appellant and Terral Anderson hitchhiked to Illinois where they stayed for a short time at the residence of a friend. They then hitchhiked to Nashville, Tennessee, and it was there that appellant met the decedent Tait for the first time. He testified that Tait employed him to assist in the repair and assembly of the stained glass planters and other objects which Tait was carrying in his truck. The two left Nashville the following morning and traveled to several state parks for about a week prior to attending a crafts show in Townsend from June 27 to 29, 1980. Numerous witnesses testified to their presence together at Townsend during that show, and several witnesses testified that the two were seen leaving together in Tait's truck on the morning of Monday, June 30, 1980, traveling toward Gatlinburg. Appellant testified that Tait had had a successful show in Townsend and had sold several hundred dollars worth of merchandise. He claimed that Tait had paid him about two hundred dollars as commissions for his assistance in the preparation and sale of art objects at the Townsend fair. There was testimony that Tait had had some $10,000 worth of inventory on his truck when he originally left Arkansas.

Tait was shown to have contacted an official at the Smithville, Tennessee, craft show which was to be held

on July 4. A letter and a deposit for an entrance fee were received in Smithville under Tait's signature dated July 1, 1980, and postmarked on that same date from Asheville, North Carolina.

Tait was never seen alive after he and appellant were seen driving together on the morning of June 30. Early on the morning of July 1, 1980, appellant arrived alone at the residence of relatives in Weaverville, North Carolina, in possession of Tait's truck and inventory. He told several relatives in Weaverville that he was engaged in selling the planters and other wares contained in the truck. He gave one relative a director's chair which had belonged to Tait, and to others he gave several of the planters and stained glass ornaments. He told several witnesses that he had come from Arkansas and that he was en route to Florida for a crafts show. He did appear in Hilliard, Florida, in the afternoon of July 3, 1980, where he met Becky Bladow and her brother. He had been acquainted with Miss Bladow for some time and dated her on several occasions after reaching Florida. During the next several days he cashed six checks on Tait's bank account, forging Tait's name as drawer, and making all of the checks payable to himself. He endorsed these and was assisted in cashing them at a grocery store and a liquor store by acquaintances in the area. He gave away a large number of the stained glass articles in the truck and sold others for a nominal price.

He stayed in the area of the Georgia-Florida border for approximately a month and left immediately after being interviewed by investigating police authorities. He was

arrested early in September 1980 near the Mexican border, although he insisted that he did not intend to leave the United States but that he was en route with his wife to visit some of her relatives in California.

Two separate investigations into the fate of the victim, Hunter David Tait, were commenced, one of them in Florida and one in Tennessee. Ultimately officials of the two states made contact, and events surrounding his disappearance and the implication of appellant were pieced together by excellent investigative work. Trial of this case consumed many days and involved numerous witnesses from Tennessee, Arkansas, North Carolina, Georgia and Florida.

After Tait did not return to his Arkansas home his mother, Mrs. Hannah Walker, a resident of Florida, became concerned and caused an investigation to be commenced. She received a postcard from a neighbor of Tait in Arkansas, stating that he had not returned from his trip and was long overdue. On or about August 1, she went to the First National Bank in Merritt Island, Florida, where Tait had his business account under the name of Pine Mountain Glaziers and inquired whether there had been any recent activity in the account. She was shown a number of checks dated during July which she and the bank official immediately recognized as forgeries. She then went to the Rock Ledge, Florida, Police Department and filed a missing person report.

Since the checks were made payable to appellant and were endorsed by him, he was promptly drawn into the investigation. Mr. Henry L. Hines, Jr., an official of the Nassau County, Florida, Sheriff's Department investigated

the area where the checks had been cashed and ultimately interviewed appellant in Jacksonville, Florida. At that time appellant was not accused of any offense and was not arrested. The investigation was conducted simply in an attempt to obtain information concerning the missing individual, Hunter David Tait. Appellant told Officer Hines that he had met Tait several months previously in the arts and crafts business and had worked for him. He stated that Tait was running out of money, needed funds, and that Tait had sold him his truck for fifty dollars. He said that the last time he had seen Tait was in a motel near Townsend, Tennessee, where Tait was waiting for someone to pick him up and take him back to Clinton, Arkansas. Appellant stated that Tait owed him money for work he had done and that he had been receiving checks from Tait by mail through General Delivery in Callahan, Florida.

Investigation by Hines revealed a number of discrepancies in this story, but when he tried to contact appellant further, he found that appellant had left the north Florida area and Officer Hines was never able to locate him again. He did observe Tait's truck, however, the camper which had been removed, and some of the remaining stained glass inventory. He also interviewed a number of relatives and other persons who had been with appellant during the period from early July until early August when appellant apparently fled the area as a result of the investigation.

Separately and independently of the Florida investigation, one had commenced in Tennessee upon the discovery of Tait's decomposed body near the Tennessee-North Carolina border in Greene County on July 6, 1980. The skull had

obviously been severely crushed and the body was found in a remote area some 139 feet from a roadway where it had apparently been dragged through the underbrush. Some coins, a comb, a cigarette lighter and a few other items of personal property were found near the body, but no items of identification were found. Ultimately, on about August 5, 1980, fingerprints from the body were found by the FBI Laboratory in Washington to match those of Hunter David Tait. Tait had applied for employment with the FBI in 1961 and a set of fingerprints had been taken from him at that time.

After the body had been identified, Special Agent Robert Baird of the Tennessee Bureau of Investigation commenced an extensive investigation into Tait's background and the circumstances of his disappearance. He contacted Tait's mother in Florida and was ultimately placed in touch with the Florida officials who had been separately investigating in that area. Agent Baird presented the case to a Greene County Grand Jury in early September 1980, and appellant was arrested in Texas the following day.

At the trial appellant testified that he had worked for Tait and had purchased his truck for fifty dollars. He said that he did not purchase the inventory but, in effect, admitted that he stole all of Tait's personal property from him. He testified that he left Tait near Townsend where Tait was expecting someone to pick him up to take him on a trip to the Bahamas. He denied the homicide, and as stated earlier, no direct incriminating evidence was found on appellant, such as a murder weapon, traces of blood or the like. Similarly there was no trace of blood in the truck which appellant was driving, which was registered and

licensed to Tait in Arkansas. Appellant admitted that when he was driving from North Carolina to Florida in the vehicle he was stopped after passing an agricultural inspection station and he showed some Arkansas identification to the investigator at that time. He admitted having possession of Tait's checkbooks and admitted forging six checks, totaling several hundred dollars, on Tait's account in early July. He testified that he threw the remaining checks out of the window while he was driving from Florida to Texas in a borrowed car. He admitted borrowing the car and leaving the Callahan, Florida, area immediately after and as a result of his being drawn into the investigation and after being interviewed by Officer Hines.

Obviously the trier of fact was not required to accept the credibility of appellant or to believe his account of his acquisition of Tait's vehicle and personal property. See Bass v. State, 191 Tenn. 259, 231 S.W.2d 707 (1950). He admitted on direct examination to two prior convictions for burglary and larceny, and his own counsel, in arguing to the jury, admitted that appellant's story bordered on the preposterous. His assertions that Tait, a settled businessman with established habits, would sell his specially equipped truck for fifty dollars and leave on a totally unplanned trip to the Bahamas certainly strains credulity. Admittedly there were some gaps in the proof of the State, such as the absence of blood in the truck or clear identification of a murder weapon in the possession of appellant. Appellant was shown, however, to have been in possession of a collection of rocks, at least one of which could have been used to crush the skull of the victim. Obviously, any other rock or hard object could

have accomplished the same purpose. Expert witnesses for the State testified that the body appeared to have been submerged in water, at least partially, for several hours. A sleeping bag which had originally been in Tait's truck was missing and never located. It was the theory of the State that appellant struck Tait at some point near a stream and ultimately removed his body to the site where it was discovered, probably dragging it from the roadway on the sleeping bag.

Although the evidence against appellant was circumstantial, it was obviously most incriminating. In our opinion it pointed unerringly to the guilt of appellant and was sufficient for the trier of fact to find guilt beyond a reasonable doubt. The date of death was fixed by experts at about June 30, 1980, and this coincides with the last date on which Tait was seen alive. If he lived long enough to post the letter to Smithville from Asheville on July 1, 1980, his death must have occurred immediately thereafter. It is of course possible that appellant found the letter among Tait's possessions and posted it himself. In all events, death must have occurred either on June 30 or July 1. Appellant was found in sole possession of Tait's truck and personal property early on the latter date, and Tait was never seen alive after June 30.

The evidence supports the conviction, and the issues challenging its sufficiency are overruled.

Error is asserted in the admission of statements made by appellant to Officer Hines in Jacksonville, Florida, and a later statement after his arrest and incarceration to Agent Baird in Greeneville, Tennessee. After a full hearing, the trial court found that the statements were

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voluntarily made and were admissible. The record sustains that finding. The statements made to Officer Hines in Florida were made at a time when appellant was neither in custody nor suspected of any offense. Tait's death had not been discovered at that time, and appellant was simply one of numerous persons interrogated for information in connection with a missing person report. When he later gave a statement to Agent Baird in Greeneville, he was given proper warnings as to his constitutional rights, was in no way coerced and gave the statements voluntarily. Further, none of the statements made to investigating officers were greatly different in content or in their incriminating nature from statements made by appellant to numerous relatives and other witnesses who testified as to how he came into possession of Tait's truck and inventory. There were differences in the details given, but at no time did appellant ever admit the homicide for which he was on trial. In the end, the testimony of the police officers as to appellant's statements was largely cumulative of the testimony of other witnesses.

Appellant insists that the prosecutor was guilty of misconduct in attempting to place into evidence a large rock which was apparently found among a box of other rocks collected by appellant and found in Tait's pickup truck. Appellant denied having possession of the particular rock complained of, and it was ultimately excluded from evidence. We find the issue with respect to that rock to be without merit.

Similarly without merit is a contention that the trial court erred in admitting pictures of other artistic

works done by Tait, in addition to those which were found to have been in appellant's possession. The purpose of this testimony was to show the skill of Tait's artistry and the relative worth of items created by him, and we find no error in their admission.

Complaint is made of the admission of a photograph of the body of the deceased at the time it was discovered. The trial judge excluded all of the photographs offered by the State which in any way showed the head and face of the deceased, and the only photograph which he admitted into evidence was one showing the lower portion of the body lying in some underbrush. This illustrated the place and area where the body was found, was not prejudicial or grotesque and, in our opinion, was relevant to the question of the concealment of the body.

Complaint is also made that the trial court permitted the actual skull of the deceased to be used by expert witnesses to demonstrate the injuries thereon. The skull had been cleansed and was no more prejudicial or gruesome than a model or diagram would have been. There is no question but that the nature and type of injuries sustained by the deceased and the manner in which death occurred were relevant for consideration by the jury. The issue is without merit.

Complaint is also made of the admission into evidence of previous convictions of appellant for larceny and burglary. This testimony was actually brought out on direct examination of the appellant by his own counsel, but after the trial judge had ruled preliminarily that the two convictions could be used by the State on cross-examination of the appellant if he took the witness stand. We find no error in the ruling of

the trial judge. It was well within the guidelines of State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), dealing with the cross-examination of a defendant concerning prior convictions.

Appellant assigns error upon the refusal of the trial judge to grant a continuance "because of the difficulty in processing the out-of-state subpoenas." Also, during the course of the trial, it appeared that appellant's wife had not arrived to testify as expected, and the refusal of a continuance at that stage of the trial is also assigned as error.

We find both issues without merit. There is no showing that any witness desired by appellant was not subpoenaed, even though there may have been some delays in obtaining advance costs from the County. The State's case in chief consumed several days, and there is no showing of any prejudicial delay or other basis for reversing the judgment of the trial court.

With respect to appellant's wife, there is neither an affidavit from her nor an offer of proof by counsel as to what her testimony would have been. Under those circumstances we cannot reverse the trial judge for refusing to declare a mistrial or postponing further the trial which was nearing its completion when application for a continuance was made. On the previous day he had permitted an early adjournment and an overnight recess in order that counsel for appellant might arrange for the presence of witnesses who were en route. There was no abuse of discretion in his declining to further recess the trial, particularly when the materiality of the testimony of the witness has not been demonstrated.

It is asserted that the trial court erred in not allowing individual voir dire examination of the jurors and in excusing those jurors who stated their opposition to the death penalty. The voir dire examination of the jurors has not been included in the record on appeal, and we have no way of reviewing these issues. There has been no request for a supplemental transcript, and we cannot predicate a reversal of this conviction on undocumented assertions.

Finally it is urged that the trial judge erred "in not allowing the defense to stipulate that the defendant, Timothy Eugene Morris, did indeed forge the checks of Hunter Tait."

The State proved the custody of Tait's checks by appellant, the forgeries which he committed and his ultimate destruction of the remaining checks. This was competent evidence which was established by a series of witnesses. There has been no showing of any violation of any rights of the accused in the refusal of the State to enter into a stipulation which would have either curtailed or eliminated this testimony. As previously stated, the evidence of the guilt of appellant in this case was circumstantial only, and the State was entitled to prove all of the relevant circumstances in such manner as it saw fit, within the rules of evidence. Stipulations are a matter of mutual agreement and not a matter of right by one party or the other in an adversary proceeding.

We have carefully considered all of the issues presented by counsel for the appellant and have independently reviewed the entire record in this case. We can reach no other conclusion than that stated by the trial judge in his

report on this case required pursuant to Rule 12 of the rules of this Court. He stated that in his opinion this was a brutal murder planned in advance for the purpose of robbing the deceased. The record fully supports this conclusion and supports the findings of the jury that there were two aggravating circumstances proved which were not outweighed by any mitigating circumstances. These were that the defendant had previously been convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person and that the murder was committed while he was engaged in, was attempting to commit or was fleeing after committing a robbery. T.C.A. § 39-2404(i)(2) and (7).[1]

We do not find that the sentence in the present case was disproportionate to that rendered in other cases. The perpetrator of the brutal murder in this case attempted to conceal the body and the evidence of the crime. Appellant was shown to have been with the deceased shortly before his death and admittedly robbed him of his valuable inventory of merchandise, forged checks on his account and undoubtedly stole his vehicle as well. We cannot say that the death penalty is inappropriate or that the jury acted arbitrarily in imposing it.

The sentence is affirmed. The date of execution is fixed at February 1, 1983, unless stayed or otherwise ordered by this Court or other proper authority. Costs are assessed to appellant.

William J. Harbison

William J. Harbison, C.J.

Fones, Cooper and Drowota, JJ., concur; Brock, J., concurs in the foregoing opinion except as to the imposition of the death penalty. He dissents from the death penalty sentence for the reasons expressed in his dissenting opinion in State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

[1] Appellant's conviction of homicide in a previous Georgia criminal proceeding was not introduced at the guilt phase of the trial but was proved by the State at the sentencing hearing.

IN THE SUPREME COURT FOR THE

STATE OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE	]	
PLAINTIFF-APPELLEE,	]	
	]	
VERSUS	]	APPEAL FROM THE CRIMINAL COURT OF GREENE COUNTY,
	]	TENNESSEE.
TIMOTHY EUGENE MORRIS	]	NO. 6324 (Greene County) S. Ct. No. 16
DEFENDANT-APPELLANT.	]	Offense: First Degree Murder

PETITION FOR REHEARING

WILLIAM H. BELL
Attorney for Appellant
101 West Depot Street
Greeneville, Tennessee 37743
(615) 639-7279

PETITION FOR REHEARING

Comes the Appellant, pursuant to Rule 39, of the Tennessee Rules of Appellant Procedure, and petitions this Honorable Court for a rehearing soley upon the issue concerning the prosecutors gross misconduct in his repeated attempts to introduce into evidence a large rock which he knew to be irrelevant and his unfounded and knowingly false inference that the large rock was the murder weapon. As grounds for the petition, the appellant relies upon the recent case of Commonwealth v. Allen B. Hoppin, M-2781 Supreme Judicial Court of Massachusets, (slip sheet opinion, dated, August 2, 1982), for the petitioner's contention that the court erred in concluding that the prosecutor was not guilty of misconduct in attempting to place into evidence a large rock which was never identified by the defendant, on which no tests were performed, and which was eventually excluded from evidence after vehemant objection by defense counsel.

In support of the contention that there was gross prosecutorial misconduct, the appellant directs the courts attention to the case of Commonwealth v. Hoppin, Supra. In Hoppin, the defendant was convicted of rape, assault and battery by means of a dangerous weapon, kidnapping, and receipt of stolen goods. The principal contention of the defendant in the Hoppin case is that the prosecution committed reversable error when it employed a length of rawhide, not in the evidence, and without connection to the case, as a

dramatic prop during the prosecutions closing arguments to the jury. The female victim in the Hoppin case testified that her hands had been tied with a leather strap during her assault. During his closing argument the prosecutor wrapped a length of rawhide around his hands and used it as an "oratorical prop." The leather strap had never been introduced into evidence. Apparently the trial judge was unable to see the rawhide from his position on the bench and denied the defenses motion to dismiss, and instead instructed the jury to disregard the prop. In an opinion written by Justice Hennessey, the Court found the prosecutor's display of the leather thong to be very prejudicial to the defendants case. So prejudicial in fact, that the court concluded that the trial judges curative instructions to the jury to disregard the prosecutor's remarks and the leather thong were insufficient to counteract the prosecutor's error. Judge Hennessey in speaking for the court said:

> We conclude that under the circumstances the display of rawhide was a serious prosecutoral error and required a reversal of convictions". Hoppin, Supra.

The appellant readily admits that the prosecutorial misconduct found in the Hoppin case occurred during the final argument before the jury as opposed to the cross-examination of the defendant as in the present case at bar. However, in the Appellant's opinion, in both instances the main thrust was that the prosecutor's conduct was so pre-

judicial as to warrant a reversal of conviction, regardless of whether it was during cross-examination or the final argument. Further, in the Hoppin case the court at least tried to cure the prosecutorial misconduct by curative instruction. In the present case at bar, there was not even a curative instruction given to attempt to cure the prosecutorial misconduct.

CONCLUSION

In conclusion, the appellant respectfully requests that the court grant the petition to rehear, and in light of the holding in, Commonwealth v. Hoppin, supra., and based on the appellants contentions the court erred in failing to find prosecutorial misconduct in the present case at bar, the appellant submits that a change in the courts position regarding the prosecutorial misconduct alleged, would result in either a commutation of the appellant's sentence to life in prison or a new trial on both guilt and sentencing.

WILLIAM H. BELL

BY: W. H. Bell

William H. Bell
BELL & MILLS
101 West Depot Street
Greeneville, Tennessee 37743
(615) 639-7279

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for Rehearing on behalf of the appellant has been forwarded by U. S. Mail postage prepaid to William Leech, Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville Tennessee 37219.

This the 21 day of October, 1982.

W. H. Bell

WILLIAM H. BELL

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED
NOV 29 1982
JOHN A. PARKER, Clerk
BY _____

STATE OF TENNESSEE,
Plaintiff-Appellee,

vs.

TIMOTHY EUGENE MORRIS,
Defendant-Appellant.

Greene Criminal
No. 6324
S. Ct. No. 16

ORDER ON PETITION FOR REHEARING

A petition for rehearing has been filed on behalf of appellant, Timothy Eugene Morris. After consideration of the same the Court is of the opinion that the petition is not well taken. It is accordingly overruled at the cost of appellant.

ENTER this _____ day of November, 1982.

William J. Harbison

William J. Harbison, Justice

Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-6089

TIMOTHY EUGENE MORRIS,

PETITIONER,

V.

STATE OF TENNESSEE,

RESPONDENT.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. LEECH, JR.
Attorney General of
Tennessee
Counsel of Record

WAYNE E. UHL
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Whether voluntary statements made by petitioner to police before and after his arrest were taken in accordance with petitioner's constitutional rights, and were properly admitted into evidence?

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OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 641 S.W.2d 883.

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Tennessee, affirming his conviction of murder in the first degree and his sentence of death. The judgment was entered on October 12, 1982, and a petition for rehearing was denied on November 29, 1982. The Petition for the Writ of Certiorari has been timely filed with this Court, and was received by the respondent on January 26, 1983.

Petitioner seeks review pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The victim, Hunter Tait, was a resident of Arkansas and made a living manufacturing and selling ornamental objects. He met petitioner in Nashville, Tennessee, in June of 1980, and employed petitioner to assist him as he traveled between arts and craft shows. Tait was last seen on the morning of June 30, 1980, accompanied by petitioner, driving Tait's truck out of Townsend, Tennessee. Tait had sold several hundred dollars' worth of merchandise, and still had valuable inventory in his truck.

The next morning, petitioner arrived by himself in a town in North Carolina, driving Tait's truck and giving away inventory from the truck. He later drove to Florida where he cashed several checks on Tait's bank account, making the checks payable to himself and forging Tait's signature.

Meanwhile, Tait's mother, who lived in Florida, heard that her son had not returned home to Arkansas as scheduled, and discovered that someone had been forging checks on Tait's account. A missing person report was filed, and the checks were traced to Nassau County, Florida, where Officer Henry Hines began looking for petitioner in the hope of finding the missing Tait. Petitioner was found at a trailer park in Jacksonville on August 5, 1980, and the officers identified themselves to him.

Officer Hines told petitioner that he was "in no form of trouble" and they were only trying to find out where Tait was. The petitioner stated that he had known Tait for about six months, and that Tait had been running out of money. Petitioner stated that he had bought Tait's truck for $50.00 about two weeks earlier, and that they had split up. Petitioner indicated that Tait had owed him money, and was mailing checks to petitioner in Florida. Officer Hines later discovered several discrepancies in petitioner's story, but was not able to find petitioner again. On August 6, Officer Hines put a capias on the computer to have petitioner picked up for forgery.

Meanwhile, Tait's body had been discovered in Greene County, Tennessee, on July 6, 1980. It was not identified, however, until August 5, 1980, and only then was Agent Robert Baird of the Tennessee Bureau of Investigation able to contact Florida authorities. Agent Baird collected more evidence and presented a case against petitioner to the Greene County Grand Jury, which charged petitioner by presentment on September 2, 1980. Petitioner was arrested in Texas the following day.

On September 6, 1980, Agent Baird photographed and fingerprinted petitioner, and began to interview him. Agent Baird advised petitioner of his Miranda rights, and petitioner waived those rights and made a statement. Agent Baird testified that petitioner never requested an attorney. Petitioner's statement was another contradictory account of his dealings with Tait.

Petitioner filed motions to suppress both statements before trial, and separate evidentiary hearings were held in the state trial court. The trial judge found that when petitioner made his statement to Officer Hines in Florida, he was not subjected to custodial interrogation and was not even a suspect at that point. The trial judge further found that the statement given to Agent Baird in Tennessee was made after petitioner had been fully and adequately advised of his rights and had executed a voluntary waiver of those rights. The judge further found as a fact that petitioner had not requested counsel.

The Tennessee Supreme Court found that the record sustained the trial judge's findings, and held that the statements had been properly admitted. The court further noted that the statements themselves were largely cumulative of the testimony of other witnesses, and were not directly incriminatory of petitioner. State v. Morris, 641 S.W.2d 883, 888 (Tenn. 1982).

ARGUMENT

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TAKING OF THE STATEMENTS, AND THEY WERE PROPERLY ADMITTED INTO EVIDENCE.

A. Petitioner was not "in custody" when he made his statement to Officer Hines in Florida, and the record supports the finding that the statement was made voluntarily.

The special protections of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), come into play only when a criminal defendant is subjected to the peculiarly coercive impact of a "custodial" police interrogation. This was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. Thus, unless the law enforcement officials have by their actions created an unusually coercive situation, a simple interview in a person's home or even at a police station does not require Miranda warnings if the person is free to leave. See Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

In the instant case, petitioner was approached by the officers in Florida at a trailer home where he was staying. Officer Hines explained to petitioner that he was not suspected of wrongdoing, and that the police were merely trying to locate a missing person. Petitioner was free to leave, and subsequently did so. Furthermore, there was substantial evidence that petitioner's statements were given voluntarily. Officer Hines testified that although petitioner appeared to be tired, he was alert and coherent, and was not intoxicated at the time.

This evidence supports the state court findings that petitioner was not "in custody" for Miranda purposes, and that his statement was given voluntarily. This case presents no more than a conflict as to factual determinations, a conflict which has been resolved by the state courts and which need not be reviewed by this Court.

B. Petitioner's statement to Agent Baird in Tennessee was made after a knowing and voluntary waiver of his rights.

While the State has a heavy burden of proving that a defendant has knowingly and intelligently waived his rights after receiving the Miranda warnings, the issue of the voluntariness of the waiver is a factual determination to be made by the trial judge. The execution of the written waiver of rights form is strong proof of a voluntary waiver. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); Taque v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980).

In the instant case, the trial judge's finding

that petitioner knowingly and intelligently waived his rights and voluntarily made the statement was fully supported by the record. Agent Baird testified that in addition to acknowledging his rights and signing the waiver form, petitioner never requested that an attorney be present and was not coerced in any way before making his statement. The trial judge accredited this testimony. Petitioner's refusal to sign a condensation of the statement was a minor fact to be considered, but did not preponderate against the circumstances which established waiver and voluntariness.

Once again, petitioner has simply presented a factual controversy which was resolved by the lower courts, and he has not presented a novel legal or factual situation requiring review by this Court.

CONCLUSION

For these reasons, the State of Tennessee respectfully requests that the petition for the writ of certiorari be DENIED.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General of Tennessee

WAYNE E. UHL
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class U.S. Mail, postage prepaid, to Mr. William H. Bell, 101 West Depot Street, Greeneville, TN 37743, this the 18th day of February, 1983.

WAYNE E. UHL
Assistant Attorney General